LIAN MAH MOTOR SDN. BHD.

v.

DING NGUK BING & ANOR.

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[CIVIL SUIT NO. 327 OF 1982]
20 FEBRUARY 1991

HIRE PURCHASE: *Assignment of rights - Statutory requirements - Equitable or legal - Notice - Writing - Receipt of notice - Joining assignor as party to proceedings - Civil Law Act 1956, s. 4(3).*

The hirer, H hired out a tyre shovel to the first defendant D1 by way of a hire-purchase agreement (the said agreement). Under a dealer's master agreement between H and the plaintiff, LM, it was agreed that all payments under the said agreement were to be paid to LM who would in turn pay H. As a default by the D1 in payments, LM paid H in full the monies due under the said agreement to H. LM then entered into a deed of assignment with H whereby they allege that they had become the legal owner of the vehicle and that they were entitled to take legal action against D1 for the defaulted payments.

D1 contended that he was not aware of the deed of assignment and that as required by law, no notice of such an assignment was given to him and submitted that therefore, the assignment was void against him.

LM contended that D14 was the original office copy of the notice to D1 of the assignment and that P10 was the original first copy of the notice which was sent to D1, with letter head, and in the form of a carbon copy. It was alleged that a photocopy was also sent to the 2nd defendant, D2, a guarantor.

Held:

[1] If it was true that both the original of P10 and a photocopy had been sent out, it is strange that P10 carries a letter head and that it is in the form of a carbon copy; neither could P10 have been made in 1982 as at that time, telephone numbers were only in 5 digits and yet P10 contains a telephone number with 6 digits. In addition there were typing differences between D14 and P10. In view of the quality of the evidence and the witnesses, the existence of P10 as being the original is to be doubted.

[2] The record book, which contains despatch of copies of notices, is, apart from its unconvincing evidence, of no evidentiary value as the date therein is the date of despatch and not the date of receipt by D1.

[3] As a result, LM had not succeeded in proving that there had been a written notice given to D1 and had therefore failed to comply with s. 4(3) of the CLA 1956 as to the requirements of a statutory notice.

[4] Since no notice was given the assignment is treated as an equitable assignment and accordingly the assignor must be joined as a party - as the assignor H had not been made a party, LM's claim is dismissed.

[Order Accordingly.]

Cases referred to:
Hockley & Papworth v. Goldstein [1920] All ER 480
Holt v. Heatherfield Trust Ltd. & Anor. [1942] 2 KB 1
Malaysian International Merchant Bankers Bhd. v. Malaysian Airlines System Bhd. [1982] 2 MLJ 59

Legislation referred to:
Civil Law Act 1956, s. 4(3)

Other sources referred to:
The Law of Hire-Purchase (1967) p. 678 by A.G. Guest

For the plaintiff - A. Ramanathan; M/s. Loke, Chew & Zainal
For the defendants - S. Sivasubramanian; M/s. Siva, Ram & Associates

JUDGMENT

Lamin Mohd. Yunus J:

The plaintiff is a private limited company and by a deed of assignment dated 25 September 1983 between the plaintiff and Hock Thai Finance Corporation Berhad (hereafter referred to as the "said company") the said company assigned all their legal rights in vehicle Kimco JH 65 CN Tyre Shovel (hereafter referred to as the "said vehicle") to the plaintiff. The 1st defendant was at all material times the hirer of the said vehicle while the 2nd defendant, the guarantor of the 1st defendant by virtue of a guarantee agreement dated 15 November 1980 (P12). The said company let the said vehicle to the 1st defendant by a hire purchase agreement also dated 15 November 1980 (P1) wherein it was stipulated that the hiring was payable by an initial payment of RM33,000 and 23 monthly instalments of RM1,808.30 p.m. and a final payment of RM1,809.10 with effect from 15 December 1980.

The plaintiff alleged in its statement of claim that the 1st defendant did pay a sum of RM33,000 on 15 November 1980 being the down payment and also one monthly instalment of RM1,808.30. He failed to make any further payments. On 21 September 1982 the plaintiff sent a notice to both the defendants determining the hiring and claimed the sum of RM45,581.70 being the total balance due. In fact the said vehicle was sold by Oriental Machinery Sdn. Berhad to the 1st defendant and according to PW1 (the managing director of the plaintiff company), the 1st defendant approached PW1 for a loan and for that purpose the hire purchase agreement (P1) was accordingly signed by using Hock Thai Finance Corporation Berhad's agreement form because the plaintiff was the agent and guarantor to Hock Thai Finance. It was agreed by both parties that the said vehicle, being a tyre shovel, was goods outside the Hire Purchase Act 1967.

According to P5 (BD - 9), the hirer (the 1st defendant) was requested to pay the instalments to the plaintiff because under the dealer's master agreement between Hock Thai Finance Corporation Berhad and the plaintiff all payments under Hock Thai Finance Corporation Berhad's hire purchase would have to be paid to the plaintiff who in turn would pay to Hock Thai Finance. In the event of any default in payments, the plaintiff had to make good such default. In respect of this case, according to PW1, the plaintiff had paid the amount in full to Hock Thai Finance. Because of the 1st defendant's default, that is, having paid only the 1st instalment, the vehicle had to be repossessed. It could not be done because it could not be traced. When the plaintiff had completed paying Hock Thai Finance, they then entered into a deed of assignment referred to above.

In his statement of defence, the 1st defendant maintained that he was not aware of the said deed of assignment and that there was no notice of such an assignment as required by law to be given to the defendants, and accordingly the said assignment was therefore void as against the defendants.

Of course the plaintiff maintained that there was assignment (P9) and D14 was the original office copy of the notice to the 1st defendant of the assignment. P10 however appears to be the original first copy of the notice with a letter head but it was produced by the plaintiff in the form of a carbon copy. This was challenged in open Court during the cross-examination of PW1 about which I shall deal later. Now the proposal form for the hire purchase (P2) was signed by the 1st defendant with Hock Thai Finance and also the hire purchase agreement (P1) using the printed forms of Hock Thai Finance. Both were sent to the 1st defendant under a covering letter dated 24 November 1980, the office copy of which was produced as P5.

In view of the existence of the written assignment (P9), the question is, can the plaintiff succeed in the present action against the defendants if no written notice of the assignment had been received by them?

It must be remembered from the outset that the plaintiff was initially an agent of Hock Thai Finance and in the words of PW1:

> We used Hock Thai Finance Corporation Berhad's agreement form because we were the agents and guarantors to Hock Thai Finance Corporation Berhad.

This is also evidenced by P2 (BD - 3) and P3 (BD - 4). PW1 further said that according to P5 (BD - 9) the hirer (1st defendant) was requested to pay the instalments to the plaintiff who in turn would pay Hock Thai Finance Corporation Berhad. PW 1 also said that when the plaintiff completed payment to Hock Thai Finance, the plaintiff then asked Hock Thai Finance to sign a deed of assignment (P9 / BD - 13) which they did on 25 September 1982. On 2 October 1982 the plaintiff sent a notice (P10 / BD - 12) to the 1st defendant about the assignment and also informed him that since they had become the legal owner of the vehicle by virtue of the assignment, they were then entitled to take legal action against him for his default of payment. According to PW1, a photocopy of the notice (P10) was also sent to the 2nd defendant.

It was the submission of the learned Counsel for the defendants that the whole case rested on P10. He alleged that PW1 was never honest when giving his testimony. I think so too. Firstly as was pointed out by the learned Counsel for the defendants, the letter dated 24 November 1980 (P5 / BD-9) was an office copy because it was not written on a letter head. Yet P10, the notice (the original 1st copy of which was supposed to have been sent to the 1st defendant) must therefore be the office copy and accordingly it was to be expected to appear not on a letter head. It however bears the letter head. Also amazingly it is a carbon copy. PW1 said:

> Both the original and photocopy of P10 were sent to the 1st defendant and guarantor respectively.

> If it was true that both the original of P10 and a photocopy of P10 had been sent out, why then is P10 with a letter head and in the form of a carbon copy. Again, the original notice was supposed to have been written in 1982 and he agreed on cross-examination, that his telephone number was in five digits then. Yet on P10 it is in six digits. On further cross-examination PW1 agreed that for Kuantan, in 1984, telephone

numbers were changed from five to six digits. So P10 could not have been made in 1982. Now D14 according to PW1 is the original copy. On comparison I found the manner in which it was typed somewhat different. The first and the second paragraphs of D14 did not begin at the margin as in P10. Finally he said he made P10 himself by asking his clerk to type it. Frankly I could not follow his reasoning for making P10. At some point I began to suspect that he was making an attempt to put the blame on his Counsel. The cross-examination of PW1 ended as follows:

Q. Why no punch holes in D14 when all other documents of yours have file punch holes?

A. Probably the lawyer's office punched the holes. I never made the holes.

The lawyer did not ask for the original of D14.

Q. Put: - D14 was created by you between 28 August 1987 and today?

A. Not true.

Q. Put: - P10 itself was created before hearing of 8 May 1986?

A. Not true.

I never lied in Court.

He was an unreliable witness.

Despite all that, the plaintiff wanted the Court to believe that by the evidence of P11 (the Record Book), it was proved that the notice (P10) had been sent. In his examination-in-chief, PW1 told the Court that on 2 October 1982, the notice (P10 / BD-12) was sent to the 1st defendant. On the same day he also sent a photocopy of P10 to the 2nd defendant. From P11 there is the last entry (p. 113) dated 11 October 1982 and according to him that refers to the despatch of the copies of the notices. As was observed by learned Counsel for the defendants, that entry was the only case where two (2) lines or entries were written in one single spacing. Furthermore the entries refer to "letter" and not "notice". In my view that makes the entry or entries suspect. Even if it is not treated as suspect, it is only corroborative in nature as far as the existence and the sending of the notice P10 is concerned. That the existence of P10 itself as being the original is much to be doubted in view of the quality of the evidence and the witness. What is pertinent to be determined here is not the fact of 'despatch' or 'sending' of the notice but the fact of 'receipt' and the date of the receipt of the notice. Atkinson J in the case of *Holt v. Heatherfield Trust Ltd. & Anor.* [1942] 2 KB 1 at p. 6 said:

> It is express notice in writing given to the debtor, and, in my judgment, the date of that notice is the date on which it is received by or on behalf of the debtor.

The date in P11 is the date of despatch and not the date of receipt by the 1st defendant. In my view P11 has no evidentiary value. In the circumstances, I felt bound to draw the inference that the plaintiff had not succeeded in proving that there had been a written notice given to the 1st defendant of the assignment. Accordingly he had failed to comply with s. 4(3) of the Civil Law Act 1956 (Act 67) in not giving the statutory notice as required therein. In the case of *Holt v. Heatherfield Trust Ltd. & Anor.* [1942] 2 KB 1 Atkinson J said (at p. 4):

> Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment.

In the words of Bailhache J in the case of *Hockley & Papworth v. Goldstein* [1920] All ER Rep 480, the notice shall not be sufficient if given in other way except in writing.

In our case the assignment must therefore be treated as an equitable assignment, and accordingly the assignor must be joined as a party. I find support in *The Law of Hire-Purchase* by A.G. Guest [1966] at p. 678 which states:

> The owner must be joined as a party to any action instituted against a hirer by an equitable assignee.

The assignee may sue in his own name provided that he makes the assignor a party to the action, as plaintiff if he consents, and as defendant if he does not consent (per Atkinson J in the case of *Holt v. Heatherfield Trust Ltd. & Anor.* at p. 4). The case of *Malaysian International Merchant Bankers Bhd. v. Malaysian Airlines System Bhd.* [1982]) 2 MLJ 59 was cited before me in support for the case for the plaintiff. I think this case can be distinguished in that the Malaysian Airlines System Bhd. (MAS), the defendant, was made aware of the equitable assignment on 2 July 1975 and served with a copy of it and on that date MAS became a trustee for the plaintiff (the assignee) in respect of the money due under the MAS contract with Bahagia (the assignor) and there was therefore no question of MAS not paying the plaintiff. So there was no real necessity to make the assignor a party. In the case before me, there was no notice given of the assignment as I found.

As the assignor had not been made a party in this case, I therefore dismissed the plaintiff's claim with costs.

Also found at [1991] 2 CLJ 1182